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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1930.

No. 179. October Term, 1930.

FARBWERKE VORMALS MEISTER LUCIUS & BRUNING, DEUTSCHE GOLD & SILBER SCHEIDE ANSTALT VORM. ROESSLER, and BADISCHE-ANILIN & SODA-FABRIK,
Petitioners,

against

CHEMICAL FOUNDATION, INC.; E. I. DUPONT DENEMOURS & Co., and WALTER O. WOODS, as Treasurer of the United States,
Respondents.

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Respondents.

No. 182. October Term, 1930.

BADISCHE-ANILIN & SODA-FABRIK,
Petitioner,

against

E. I. DUPONT DENEMOURS & Co., and WALTER O. WOODS, as Treasurer of the United States,
Respondents.

BRIEF ON BEHALF OF PLAINTIFF-RESPONDENT, THE CHEMICAL FOUNDATION, INC.

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BRIEF ON BEHALF OF PLAINTIFF-RESPONDENT, THE CHEMICAL FOUNDATION, INC.

NOTE: *This brief was written in answer to that filed by the Petitioner Farbwerke vormals Meister Lucius & Bruning, being the only brief filed at the time. Since then, and within less than one week of the time when counsel for the Foundation are advised that these cases will be brought on for hearing, they are informed that a brief has been filed on behalf of the Petitioners Badische-Anilin & Soda-Fabrik and Deutsche Gold & Silber Scheide Anstalt, and have been served with a copy thereof. Leave of the Court will be asked, therefore, to file a supplemental brief on behalf of the Foundation in answer to the brief last mentioned.*

Statement.

While the Petitions of all of the German Petitioners and the brief filed by the Petitioner Farbwerke vormals Meister Lucius & Bruning do not ostensibly attack the decree below in favor of the Chemical Foundation, their contentions, if sustained, would deprive it of one substantial, if relatively unimportant, part of the relief granted to it by those decrees. The Courts below held (Dist. Ct., R. 136-148, 29 F. (2nd) 597; Cir. Ct. of App., R. 181-195; 39 F. (2d) 366) that the Foundation was entitled to recover from the Dupont Company, the licensee, for all use and enjoyment of the licensed patents at all times, both before and after the patents were sold to it; that as the Foundation had, in its bill, limited the claim to compensation for use and enjoyment had after it had become the owner of the licensed patents, its recovery should be limited to that period; but that this limitation did not extend to the Foundation's rights in respect to the fund accumulated in the Treasury from the tentative royalty paid in by the licensee under the Act to

secure payment of whatever decree might be rendered in the suit, the whole of which fund was held available to the Foundation as such security, whenever accrued. If the Petitioners are right, the fund may be held to be security for claims in addition to those of the Foundation. Accordingly the Foundation is directly interested in sustaining the decree below.

Facts.

The statement of facts in the brief of the Petitioner Farbwerke vormals Meister Lucius & Bruning requires some amplification. The license in question was issued to the Dupont Company by the Federal Trade Commission on January 21, 1918. As originally issued it required the licensee to pay to Alien Property Custodian a "royalty" of 5% of the net profits derived from the sale of products resulting from the licensed use (R. 27-32). This "royalty" did not, of course, purport to represent compensation to the owner of the patents for the value of the use, but was required by the express terms of Section 10(d) of the Act to be paid and held as a trust fund for the joint benefit of the owner and the licensee, to secure whatever judgment might be rendered in a suit brought after the end of the war by the owner to recover compensation for such use. No payments were ever made by the licensee while the license stood in this original form, and it does not appear what, if any, use the licensee made of the patents during this period.

While the license remained as originally issued, the patents were seized by the Custodian. The instruments of seizure, effective February 3, 1919 and March 22, 1919 were in substantially identical form and seized not only the patents, but also

> "every right, title and interest with respect thereto, including all damages and profits recoverable at law or in equity from any person, firm, corporation or government, for past infringement thereof" (R. 76, 78, 80).

The patents and appurtenant rights thus seized, including as we contend and the Courts below held, the present rights of action, were conveyed on April 10th, 1919 to the Foundation. The original conveyance clearly covered all that had been seized (R. 81-85). It assigned

> "1. Each of the letters patent of the United States and applications for letters patent of the United States enumerated in Schedule A hereto annexed, together with all claims and demands for profits and damages recoverable at law or in equity for the past infringement of said letters-patent * * * *All as more specifically described and set forth in the requirements or demands relating to said letters patent* * * * issued by said A. Mitchell Palmer, as Alien Property Custodian, or by me as Alien Property Custodian, *without any reservation or qualification whatsoever* * * * and subject only to the provisions of a certain release to the United States of America, bearing even date herewith, and to the rights of citizens of the United States or of friendly nations as set forth in the requirements or demands * * *" (Italics ours).

The Petition asserts that "neither the instruments of seizure (R. 75-81) nor the assignment (R. 81-85) expressly covered the accrued royalties". This statement, so far as it relates to the conveyance to the Foundation is, we submit, incorrect, since long before the right to bring the present suits accrued, the Custodian, by his confirmatory assignment of March 1st, 1921 expressly confirmed the conveyance of the rights of action as included in the original assignment, and re-conveyed them *de novo* (R. 90-96). This last-mentioned instrument was executed in pursuance of an Executive Order of President Wilson dated February 13, 1920 (R. 88-90) which stated that it had been the intention of the earlier Executive Orders, under which the Custodian had made the sale, to authorize the sale of these rights of action, and then specifically authorized him to make and confirm such sales. (R. 88-90). The statement of intention of the earlier Orders

was expressed in the Executive Order of February 13, 1920 in the following unequivocal language (R. 89):

> "Whereas it was the intention of said Executive Orders to authorize the said Custodian to sell and convey thereunder, all choses in action, rights, interests and benefits under agreements and rights and claims of every character and description including rights to receive moneys by way of royalties or otherwise as compensation for the use of patents, trade-marks, or trade-names, which the Alien Property Custodian may have seized * * *."

The Executive Order of February 13, 1920 thereupon proceeded to recite that doubt had nevertheless arisen as to the authority of the Custodian in the matter, expressly confirmed such authority, and set forth as an added reason therefor (R. 90) that

> "* * * the public interest will be best served *by the elimination of any enemy interest* adverse to American citizens arising by reason of said choses in action, or rights, interests and benefits under agreements *and by the devoting of any payment made by reason of said choses in action or under said agreements by The Chemical Foundation, Inc., to the promotion of the objects stated in its charter.*" (Italics ours.)

Under the authority again so conferred by this Order the Custodian, on March 1, 1921, executed the confirmatory assignment above referred to, by which he specifically confirmed and ratified the sale and assignment of, and did thereby (R. 95)—

> "* * * * sell, assign, transfer and set over to said The Chemical Foundation (Inc.), all choses in action, rights, interests and benefits under agreements and *rights and claims of every character and description growing out of and appurtenant to the ownership of said property, including* (but not thereby limiting the generality of the foregoing) *rights to receive moneys by way of royalties*

or otherwise as compensation for the use of patents, copyrights and trade-marks, *and all right, title and interest in and to the choses in action and the funds referred to in Section 10, sub-section (f) of the 'trading with the enemy act as amended,* acquired by the Alien Property Custodian by virute of *the seizures by which there were seized patents, copyrights, or trade-marks, under which a license had theretofore been granted in accordance with the provisions of Section 10, sub-section (c) of said act, as amended* * * *." (Italics ours.)

Nearly a year after the sale to the Foundation, on January 14th, 1920, the Federal Trade Commission amended the license so as to make the security-royalty, payable thereunder, 2% of the gross instead of 5% of the net receipts from and after August 1st, 1919 (R. 32). Thereafter the Dupont Co., as licensee, paid, under these terms, the sum of $61,884.98 which its answer (R. 43, 44) represents to be 2% of the gross amount received by it from August 1st, 1919 to September 1st, 1920, when the Federal Trade Commission cancelled the license. This fund is still held in the Treasury as security to meet the judgments in suits brought by the "owner of the patents". Under the terms of the Act any part of it not needed for the purpose is to be returned to the licensee.

The bills of complaint of the three German plaintiffs assert that notwithstanding the seizures and sales, they are the "owners of the patents" to whom the Act grants the right of action for use and enjoyment of the patents, whenever such use and enjoyment were had. They concede, however, that their claim must be limited to compensation for use before the sale (Petition, 3-4) and they do not question the Foundation's right to recover for use and enjoyment after the sale. The Foundation's bill claims compensation only for use after the sale; but its position is, and the lower Courts have held, that the right to compensation for all use was effectively seized, and was sold to it with the patents, and that its failure to claim the compensation for

use prior to the sale is an intentional waiver, destructive of that right, which accordingly has ceased to exist in favor of any one. The Foundation has not, however, waived any part of the right to avail itself of the security-royalties on deposit for the benefit of the suing "owner", and as it is the only such owner who can now exist it claims an exclusive right to the security of the whole fund. The Foundation also contends that the concession that the Foundation has the rights for the period after sale is a concession of the validity of the whole seizure, for both periods.

I.

The Circuit Court of Appeals did not err in holding that the accrued royalties (meaning the right to sue for the value of licensed use and enjoyment of the patents prior to seizure) were seized and sold to The Chemical Foundation.

This, the Petitioner's main contention, is really irrelevant, since the question whether the "accrued royalties" were or were not seized cannot affect the issue. As will appear in our second point, the right to sue was granted only to the "owner of the patents" at the time of suit. It therefore passed with the patents, which were, as this Court has itself held, validly seized and sold to the Chemical Foundation. No separate seizure or sale of the rights was therefore necessary.

The Courts below, however, held that the instruments of seizure and sale did in fact include the rights, if separate seizure was either possible or necessary. The reasoning of both opinions on this point is cogent, and needs no support from us except brief comment on the Petitioner's present attacks upon it. Their main contention on this point is that since this Court has frequently held that in a voluntary as-

signment between private parties phrases like "all right, title and interest *in*" the assigned patent do not include the right to sue for past infringement, the words of the seizure and of the original assignment in the case at bar cannot carry the right to sue for past use and enjoyment. It is argued that Section 7(c) of the Trading with the Enemy Act, in providing that a seizure of a patent "shall have the same force and effect as a duly executed * * * assignment to the Alien Property Custodian," limits the effect of an instrument of seizure to that of a private conveyance, and thus brings the present seizures within the authority of the decisions in question.

Both branches of this argument appear fallacious. In the first place the assumption that the clause which gives the Custodian's seizure "the same effect as" an ordinary assignment, means that it shall have *only* such effect, and no other, is both gratuitous and unsound. The obvious purpose of Section 7(c) as a whole was to cause seizures to vest title in the Custodian in the most complete manner possible, and the first paragraph of the section fully accomplished that result. That paragraph provides that patents, etc. shall, if required, be conveyed to the Custodian, "or the same may be seized" by him. This is a plenary grant of the power to seize. The second paragraph of the section was evidently intended merely to provide for proper recordation of instruments of seizure. It prescribes, not the effect of the instrument but the result of recording it. The fact that it contained a clause, inserted out of extra caution, to make sure that the seizure should cover all that a private assignor could convey, shows, not an intention to limit the effect of the complete seizures previously provided for, but a design to make them all-embracing. The Act has uniformly been held entitled to liberal construction, and such a limiting effect could only be given, if at all, by the strictest possible method of interpretation.

But if the Act did mean to limit the effect of the language of a seizure to that of a private assignment, the cases referred

to would not be applicable. None of the assignments discussed in these cases use the language appearing in the instruments of seizure which comprehends the patents involved and

> "every right, title and interest with respect thereto, including all damages and profits recoverable at law or in equity from any person, firm, corporation or government, for past infringement thereof."

This language is sufficiently broad to cover the rights in question for many reasons, a few of which will be noted.

(a) The words "and every right, title and interest with respect thereto" to be given any effect at all, must be held to include claims under Section 10 of the Act for past use and enjoyment of the patents, since every other conceivable interest in the subject was specifically covered either by the phrases which directly seized the patents themselves, or by those which seized the right to sue for past infringement. Effect should be given, if possible, to all parts and every clause of an instrument.

(b) These words are followed by the phrase *"including* all damages * * * for past infringement". The word "including" demonstrates that the preceding words were intended to have the broadest kind of meaning, inclusive of claims of every character.

(c) The language of Section 7(c) as amended, authorizing the seizure of patents and choses in action, did not specifically designate by description the particular choses in action here involved. Yet the authority to seize the same has, until the writing of the final point of the Petitioner's present brief, always been conceded, obviously because they were covered by the broad language used. The broad language used in the instrument of seizure should be given a like effect (see Point IV, *infra*).

(d) The patent was not seized with rights, etc. "thereto", but with every right, title and interest *"with respect* thereto".

Such phrases has been held to include references or relations exceedingly indirect. *People* v. *Clark*, 9 N. Y. 349; *Brett* v. *Rogers*, 1897, 1 Q. B. 525; *Tatam* v. *Reeve*, 1893, 1 Q. B. 44. See also *May* v. *Logan County*, 30 Fed. 250, and specially *May* v. *Saginaw County*, 32 Fed. 629, wherein the same instrument of conveyance referred to in *May* v. *Juneau County*, 30 Fed. 241, cited by the Petitioners was construed to the contrary. The Court in *May* v. *Saginaw County* also distinguishes the case of *Dibble* v. *Augur*, 7 Blatch. 86, likewise relied upon by the Petitioners.

As was said by the Circuit Court of Appeals in this case (R. 189):

> "Royalties are a very real 'interest' in, or in respect to, a patent and the right to recover royalties is a very real 'right.'"

But even if the language of the seizure had been identical with that in the cases relied on, the latter would not apply. They are decisions interpreting the meaning of instruments executed by private persons in business transactions. In such cases the Court, as in the interpretation of all grants, seeks to give effect to the actual intention of the party who uses the language which it is interpreting, and accordingly construes the granting language strictly, knowing that no grantor means to give up, and no grantee expects to receive, anything not plainly specified. Here, however, the court is interpreting, as the Circuit Court of Appeals clearly showed, an instrument of exactly the opposite character, expressing the intention of the seizor, which would naturally be as broad as possible. To the interpretation of such an instrument constructions applied to private grants afford no guide.

II.

The Circuit Court of Appeals did not err in holding that the German Petitioners were not the owners of the patents within the meaning of that part of the Act defining by whom and when suit should be brought.

The argument of the Petitioner to the contrary of this proposition (if, indeed, it is open to argument on the present record, from lack of an appropriate Specification of Error), is clearly without merit. The language of the statute is plain, simple, and unambiguous, requiring no construction. It states that at a particular time, "the owner of any patent" of the class in question may sue. When Congress used the word "owner" with reference to a particular time it used a word which can accurately and literally apply to but one individual or group. At any given moment, the ownership of any piece of property is normally if not invariably single. At a specified moment a patent can have but one owner or group of owners. Literally, then, the word must apply to the owner at the date of suit, since no other person would then meet the definition of the person authorized to sue. Any other meaning would be abnormal. To construe the word as referring to one who had ceased to be the owner before he could attempt to exercise the rights granted to the owner, would be as unnatural as to construe the powers which the Act confers upon the President, as conferred upon ex-Presidents. It is indeed a recognized principle of the interpretation of statutes that when any qualification, such as ownership, is prescribed as a pre-requisite to suit, the statute prescribing it is to be construed, unless strong indications of a contrary intent appear, as requiring the qualification at the time of suit.

Reising v. *Deutsche D. G. Hansa*, 15 Fed. (2nd), 259 (C. C. A. 2nd).

Furthermore, the recovery for which "the owner of any patent" is authorized to sue is, in the language of the Act, "for *all* use and enjoyment of said patented invention" (italics ours). The use of the word "all" implies, necessarily, *one* suit by *one* owner.

The construction which the Petitioner urges is so foreign to this plain and literal meaning of the language, that it could only commend itself if supported by convincing evidence from other parts of the Act, that it was actually intended to grant the right to sue, not merely to the owner of the patent at the time of suit, but also to former owners. No such evidence, however, is adduced. On the contrary the last clause of Section 10(*f*) itself furnishes a conclusive answer to the whole contention. That clause empowers the court, in the suit, to settle the whole future of the license, and thus of the patent and its value. As this is a matter in which the owner of the patent at the time of suit is vitally interested, and one in which former owners have no interest whatever, the latter cannot have been intended as included within the grant. A seizure, identical in all essentials, was so construed in *Hicks* v. *Anchor Packing Co.*, 16 Fed. (2d) 723. This Court has itself treated the seizures and sales as valid and as including the rights in question. *U. S.* v. *Chemical Foundation*, 272 U. S. 1, 9-10, 15-16.

III.

The Circuit Court of Appeals did not err, as urged in the Petitioner's third Specification of Error, in holding the Amendment of 1928 unconstitutional.

The Chemical Foundation is interested in this question because the German Petitioners base upon the Amendment of 1928 their contention that they, with respect to the right to sue for use and enjoyment of the patents before seizure, are "owners" entitled to sue, and are therefore entitled to

have these rights as well as the similar rights of the Foundation for the period after seizure secured by the fund paid in under the license by the licensee.

For the following reasons, we submit, this contention is unfounded.

(*a*)

It clearly appears that the entire payment made by the licensee was made with respect to use and enjoyment had after August 1st, 1919, the date as of which the license as amended called for royalty at the rate of two per cent. of the gross. No payments were made under the original license. All payments were therefore made with reference to use and enjoyment after April 10th, 1919—to wit, after August 1st, 1919. The whole fund thus arose after the Foundation became the "owner", and was paid exclusively for use and enjoyment while the Foundation was the "owner".

(*b*)

The Foundation is the only party who as "owner" can sue, and is therefore the only party entitled to the benefit of the security fund.

Long before the suits were brought, the former ownership of the Germans was completely and permanently divested (*Hicks* v. *Anchor Packing Co., supra; Junkers* v. *Chemical Foundation,* 287 Fed. 597). The German plaintiffs, therefore, were not qualified as "owners", to sue. No one else having sued, the right of the Foundation to such portion of the fund as may be necessary to secure its rights was and is exclusive.

The amendment of March 10th, 1928 (Settlement of War Claims Act, 1928, Section 19) did not change this result. If, as the German plaintiffs contend, it created, or reinstated, for their benefit, causes of action which had either never existed or had ceased to exist, it is, as the learned trial Court held, unconstitutional. While Congress may, in some cases, by removing the bar of a statute of limitations, revive

a barred claim which has an independent origin and is subject to no other defect, it cannot revive such a claim when the limitation was a part or term of the original right, and that right was created only by the statute which imposed the limitation.

Danzer v. *Gulf R. R. Co.*, 268 U. S. 633.

In that case the plaintiff, in 1921, sued for a misrouting by the defendant which had occurred four years previously. The right of action was created by the Interstate Commerce Act, which imposed upon it a two year limitation. The plaintiff contended that the Transportation Act of 1920, § 206(*f*), 41 Stat. 456, had revived causes of action barred by this provision, by extending the period of limitation to include the duration of Federal control of the railroads. The court held that to give it that effect would render the statute unconstitutional as depriving the defendant of its property without due process of law.

The principles of this decision are precisely applicable here. Under the law as it stood judicially determined before the March, 1928 amendment, none of the German plaintiffs had a right to sue. They would have been entitled to bring the suits they brought only if they had been "owners" of the patents. Having ceased to be owners before they sued, their suits were nullities. The Foundation, being the owner, had brought a well-founded suit, complying with all the terms of the right of action as created by the statute. The attempt of Congress to change those terms (if the March, 1928 amendment was such an attempt) would clearly impair the vested rights of the parties in precisely the manner condemned in the *Danzer* case.

The German Petitioners, seeking to distinguish the *Danzer* case, assert that the statute there under consideration created the right of action on which it imposed the limitation, and that in the case at bar it did not, since, when the Act was passed, the German patent owners already had a right to sue for use of the patented invention by others. This attempted distinction is, however, unsound. The particular

right of action on which the German suits are based did not exist at the time of the enactment of the Act. From the entry of the United States into the war, until the Act was passed, the German owners, as enemies, could not sue at all. If they had been able to sue, they would have been suing on an unsecured claim, instead of having the benefit of the security provided by the Act. If the Act had not been passed, there would have been no cause of action, since it must be presumed that the defendant duPont Co. would not, but for the license granted under the Act, have used the patents. Thus the actual rights claimed in the German suits had their origin in the Act alone, as clearly as the cause of action in the *Danzer* case arose out of the statute there considered; and the limitations imposed on those rights in their creation cannot be changed to the prejudice of those who have dealt with the situation relying on the statute as it stood.

As a second feature distinguishing the case at bar from the *Danzer* case, it is argued that there no suits had been commenced when the statute attempted to lift the bar of the expired limitation, while here suits had been begun. This difference, of course, exists, but does not seem to us to affect the situation. Under the law, as declared by this Court, the right of action set up in the suits did not exist at the time when they were brought. They were mere nullities—not because the statutory limitation had expired but because the plaintiffs were not qualified as "owners of the patents", to sue. The position of the plaintiffs was thus far weaker than that of one who, like the plaintiff in the *Danzer* case, has a claim valid in every respect except that of timely presentation.

The attempt of the 1928 amendment, as construed by the German Petitioners, to revivify—or rather vivify—their suits, is no mere effort to correct a technical defect, such as existed in the cases in which relief has been granted to one who sued in the wrong capacity. In those cases a clear right of action existed, and was vitiated only by a blunder in pleading, the correction of which hurt no one except the defendant, whose moral if not legal obligation was complete. Here, unless

the doctrine of *Hicks* v. *Anchor Packing Co.* is erroneous, there was no right of action at all. The Amendment, if it is to have the effect contended for, would create a right of action where none had ever existed. What the German Petitioners seek to have it accomplish is comparable to the following: A, holding B's note not yet due, goes into bankruptcy, and the note, not yet suable, passes by operation of law, into other hands. Notwithstanding that he has ceased to be the owner of the note A, after maturity, sues upon it. After the courts have decided that in an identical situation a plaintiff situated like A has no cause of action, and after B in the suit has pleaded this defense, and after the Statute of Limitations has run against the commencement of a new suit, A procures legislation that, notwithstanding all these facts, he be deemed the owner of the note, and that his suit on it be reinstated.

The case of *Danforth* v. *Groton Co.*, 178 Mass. 472, is cited as authority for the proposition that the mere fact that the limitation and the cause of action are both contained in the same statute is not determinative (German brief, p. 34). In that case, however, the plaintiff's real right to relief was not the creature of the statute, but a fundamental constitutional privilege—the right not to have his property taken from him without compensation. Far from conferring on him that right, the statute sought to restrict it by what the court considered a useless formality; and the decision merely holds that a legislature which could impose such a restriction could waive it.

Robinson v. *Robins Co.*, 238 N. Y. 271, cited (German brief, p. 34) as authority for the legislative power to remove the bar of a statutory limitation, arose out of facts so unusual as to make the decision inapplicable elsewhere, and this the opinion itself asserts (p. 280). It represented an honest attempt by the legislature to relieve a plaintiff, who, misled by a decision of the state courts, held erroneous only after the harm had been done, had pursued the wrong remedy for an unquestionable injury. It represents merely an extreme instance of the correction of a technical defect, and has no

application to a statute which seeks, not to remove an accidental barrier to a valid right, but to create a right where none existed.

In answer to our contention in this Point the German Petitioners may argue that no property of the Foundation is taken by the 1928 Amendment, because the Foundation claims to recover only for the period after assignment, while the Amendment is limited to the period before assignment. This may be sound as to the Foundation's substantive claim to compensation for use and enjoyment, but is clearly unsound as to its adjective claim to the benefit of the security fund paid in by the licensee. While we contend that in fact that fund arose out of use and enjoyment after assignment, it is plain that, however it arose, the Foundation, as the sole possible plaintiff qualified as "owner of the patents" to sue, is entitled to the benefit, as security, of the whole fund provided to secure the decree in the suit so brought. This is a substantial right, which was fully vested in the Foundation long before the 1928 Amendment was enacted. It is property of which the owner cannot under the Fifth Amendment be deprived without due process of law. The Foundation is therefore directly affected by and interested in the question of the statute's constitutionality.

The Petitioner Farbwerke vormals Meister Lucius & Bruning also argues (its Brief, pp. 36-7) that the Fifth Amendment does not limit the 1928 Amendment because the latter, as a legislative Settlement of War Claims, was an exercise of the War power. This contention was, we submit, conclusively refuted by the Courts below in their opinions, in reasoning to which little can be added. As presented in the trial Court, however, the appellant's argument placed its emphasis on the power of Congress to make rules regarding captures by sea and land. The emphasis in the Circuit Court of Appeals and in this Court is placed on the general power to dispose of war controversies. There is, however, no real distinction. Upon the transfer of the properties in question to the Foundation by a sale the validity of which has been judicially established, they passed out of

the hands of the United States, out of the category of captured property, out of the class of property to which war claims did or could exist, and into the class of private property held in sole and undisputed private ownership. However sweeping the power of Congress to settle war disputes may be, it cannot include the power to settle them, long after the war is over, by confiscating the property of American citizens. The cases cited wholly fail to support the contention. They show only that an Act passed during war, to fill a great and present war-requirement, will not be rendered unconstitutional because it casually and incidentally destroys some vested rights. The 1928 Amendment, though included in the Settlement of War Claims act, was a separate and severable enactment dealing solely with a most limited class of German claims. If it had the effect contended for, it settled them solely by transferring to the German claimants, or destroying for their benefit, long-vested rights of citizens. This was no incidental or casual by-product of the enactment but its sole and direct purpose. If the Fifth Amendment does not prevent such legislation, the protection which it affords is illusory.

The brief for the Petitioner Farbwerke vormals Meister Lucius & Bruning also contends that the 1928 Amendment did not deprive the Foundation of property because the right to royalties (meaning, we assume, the right to sue for use and enjoyment) prior to the seizure become vested in the original German owners and was never seized. We have already shown, as we believe, that nothing ever vested in the German owners except a right which must necessarily end with a transfer of ownership of the patents, and that that right passed to the Custodian both by a separate act of seizure, and also by the mere seizure of the patents, which took from the Germans and gave to the Custodian the indispensable qualification as "owner of the patent," without which the right could not be held. Each of these separate sources of the Foundation's title—the seizure of the rights themselves, and the patent-seizure—operated alike on the

rights for all periods, without distinction. The separate seizure took every right the Germans had "with respect to" the patents, past and future, without any exception of those already accrued. The patent-seizure took from them the whole of their qualification to sue, whether for past or future use and enjoyment. The German Petitioners, however, concede that the right to sue for future use and enjoyment passed to the Foundation. Since the same processes of transfer covered both past and future rights the concession as to one should be deemed a concession as to all.

If construed in such manner as to revivify the German suits the amendment would also be objectionable as a legislative usurpation of judicial functions. Before it was enacted, the courts had decided that a proprietor whose patent had been seized had ceased to be an owner entitled to sue. This was a normal exercise of the judicial function of construing a statute. Congress in the March, 1928, amendment seems to have undertaken to reverse these decisions and to reverse them as to a limited class of instances already *sub judice*, giving no similar benefit to persons otherwise situated. The provision that in the case of any patent seized by the Custodian any suit brought within the time limit "shall be considered as having been brought by the owner within the meaning of" Section 10*f*, is a direct instruction to the courts as to how they shall construe the statute in cases already before them. It cannot be saved, as some declaratory statutes are saved, by construing it as changing the rule for the future and limited to cases arising thereafter. It expressly seeks to constrain the courts in dealing with existing law suits, since the time within which suits could be commenced—one year after the end of the war—expired long before the Amendment was enacted. That that is beyond the legislative power has been well settled since the early years of the Republic.

Ogden v. *Blackledge*, 2 Cranch, 272 (2 L. Ed. 276);
Koshkonong v. *Burton*, 104 U. S. 668;
People v. *Mutual Life Co.*, 16 N. Y. 424;

Cambridge v. *Boston*, 130 Mass. 357;
McCartney v. *Shipherd*, 117 Pac. 814;
Lindsay v. *U. S. Co.*, 120 Ala. 156;
Reiser v. *William Tell Assn.*, 39 Pa. St. 137;
Titusville v. *Keystone Co.*, 122 Pa. St. 627;
Comm. v. *Warwick*, 172 Pa. St. 140;
Virginia Coupon Cases, 25 Fed. 647;
U. S. v. *Salberg*, 287 Fed. 208;
Cooley "Constitutional Limitations" (6th Ed.) 110-113.

These are but a few of the leading cases on this subject, selected from a large and apparently uniform mass. Though most of them deal with the validity of state statutes under state constitutions, the principles involved are fully applicable to the Federal constitution, which is quite as specific both in its allotment of wholly separate powers to the legislature and the judiciary, and in its prohibition of legislative action destructive of rights which have vested under existing law.

In *Koshkonong* v. *Burton*, *supra*, the defendant-in-error had recovered, under a statute of 1859, a judgment which included interest on certain coupons, the principal of which was also comprised in the recovery. The state courts had construed the act of 1859 as permitting this compounding of interest. After these decisions had settled the law of the state, but no less than twelve years before the action was commenced, the legislature, in 1868, had passed an act which provided that "it was and is the true intent" of the act of 1859 that "interest should not be compounded or bear interest upon interest".

This Court distinctly held that this declaratory statute was invalid as applied to the bonds issued prior to its enactment, and as to coupons thereon payable thereafter, not only as a legislative usurpation of judicial power, but as an attempt to impair vested rights which had arisen under the law of the state as settled by the decisions of the courts.

As that was a case in which the action was commenced only long after the enactment of the declaratory statutes it presented facts far more favorable to the validity of the statute than those in the case at bar, where the suits have been pending for years when Congress attempted to affect them.

In *Reiser* v. *William Tell Assn., supra,* the contention was that under an early statute still in force certain premiums were usurious. The courts of the state had so held. The legislature then passed an act which provided that premiums of the class in question should not be deemed usurious. In denying effect to this enactment the Court said:

> "We must again insist that the making of laws and the application of them to cases as they arise are clearly and essentially different functions, and that one of them is allotted by the constitution to the legislature and the other to the courts: 9 Casey 495. Chief Justice Gibson expressed this in *Greenough* v. *Greenough,* 1 Jones 494, 'Every tyro or sciolist knows that it is the province of the legislature to enact, of the judiciary to expound, and of the executive to enforce'. It is expressed in the Bill of Rights, requiring the courts to administer justice by the due course of law. It is expressed in the very form of government, as organized by the constitution, allotting 'the legislative power' to the legislature and 'the judicial power to the courts. * * * We hope we have seen the last expository statute under our constitution; all such are fundamentally vicious."

IV.

The power to seize the accrued royalties (meaning the right to sue for the value of licensed use and enjoyment of the patents prior to seizure) is not doubtful. The contrary is argued under Point IV of the brief of the Petitioner Farbwerke vormals Lucius & Bruning, although there is lacking any Specification of Error by that Petitioner upon which the argument may properly be advanced.

That the power to seize the accrued royalties was *not* doubtful was expressly conceded in the Petition and the brief in support thereof. In the latter, at page 16, there appears the following:

> "Under the Act the Alien Property Custodian undoubtedly had authority to seize the royalties as well as the patents."

This concession is now sought to be withdrawn, but it is still admitted—as it obviously must be—that the language of Section 7(c) of the Trading with the Enemy Act as amended November 11th, 1918, literally and specifically authorizes the seizure of such rights. That language is as follows:

> "If the President shall so require, any money or other property including (but not thereby limiting the generality of the above) patents * * * choses in action, and rights and claims of every character and description * * * may be seized by the Alien Property Custodian" (40 Stat. 1020).

If ever there was language too clear to require or permit construction this is it. The Custodian is given power to seize "any property" whatever. Care is taken that the gen-

erality of this language shall not be limited by what follows, and that the rule of *ejusdem generis* shall not apply. Beyond this, however, the clause specifies "choses in action" and "rights and claims of every character and description" as property which may be seized. If the right to sue under section 10(f) is not a "chose in action" and also a "right" and "claim" of some character or description, it is nothing which language can describe.

To alter so clear a meaning reasoning from the supposed purpose of the statute is wholly insufficient. The Petitioner's argument, moreover, in Point IV of its brief is fallacious. After stating that, as found by this Court, one of the purposes of the statute was "to weaken enemy countries by depriving their supporters of their properties" they attempt to show that this general purpose did not apply to these properties, by quoting discussions while the statute was in passage. Such discussions, of course, can never state the purpose of an act except as desired or understood by the several speakers. Whatever the proponents of a bill in committee may urge as to its intent, it may be adopted for totally different reasons. Moreover, none of the speakers quoted in the brief was or could have been trying to state *all* the purposes of the legislation. The circumstance, if it existed, of their failure to mention that it was intended, also, to give power to seize this particular class of property, cannot possibly countervail the unmistakable fact that it did, in terms, grant that very power.

Respectfully submitted,

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